In The

Supreme Court of the United States

October Term, 1977

No. 76-6513

WILLIE LEE BELL,
Petitioner,

-v.-

STATE OF OHIO,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BREIF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERITIES UNION OF OHIO FOUNDATION, INC.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND STATEMENT OF INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Ohio Foundation, Inc., respectfully moves this Court, pursuant to Supreme Court Rule 42(2), for permission to file the attached brief amicus curiae in support of Petitioner. The interest of Amicus Curiae as well as the reasons supporting the motion are set out in the following paragraphs.

(1) The American Civil Liberties Union of Ohio Foundation, Inc. (Foundation) is the separate litigative and educational arm of the American Civil Liberties Union of Ohio (Union). Both the Foundation and the Union are affiliated with the American Civil

Liberties Union. The parent and its affiliates comprise a nationwide organization of approximately 400,000 members dedicated to the protection of the rights enumerated in the Bill of Rights, and have been actively involved in the death-penalty controversy in judicial, legislative and educational forums in Ohio and elsewhere.

(2) Petitioner is one of seventy-six persons who have been sentenced to death under Ohio's new death-sentence scheme. Petitioner is one of twenty-five persons whose death sentences have been affirmed by the Ohio Supreme Court. Any decision on the constitutionality of Ohio's laws must take account of the statutory structure of Ohio's death-sentence scheme, the judicial gloss that has been placed upon it by the Ohio Supreme Court in a number of cases, the manner in which that gloss has been applied, and certain procedural aspects of Ohio's laws. As a result of its general concern about the death penalty and its specific involvement in Ohio death cases other than the case at bar, Amicus is uniquely suited to illuminate these issues.

(3) Amicus filed a brief with the Ohio Supreme Court in the case of State v. Carl Osborne, 50 Ohio St.2d 211, ____ N.E.2d ____ (1977), prior to any Ohio Supreme Court decisions interpreting Ohio's death-sentence statutes. In that brief, Amicus addressed the facial unconstitutionality of Ohio's statutes. Amicus has a continuing interest in the Osborne case, for the Ohio Supreme Court affirmed the conviction and death sentence. A decision by this Court in the case at bar will have a profound impact on the outcome of Osborne. Amicus has also filed with this Court a Motion for Leave to File a Brief Amicus Curiae (with brief annexed) in the case of Woods and

Reaves v. Ohio, No. 76-1308. In that brief, Amicus addresses the unconstitutional application of Ohio's statutes by the Ohio Supreme Court. A decision by this Court in the case at bar will also affect Woods and Reaves, in which Amicus has a continuing interest.

(4) Counsel for Petitioner has consented to the filing of the attached brief. The present motion is necessitated because counsel for the State of Ohio has refused consent.

WHEREFORE, movant prays that the attached brief amicus curiae in support of Petitioner be permitted to be filed with the Court.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae, American Civil Liberties Union of Ohio Foundation, Inc., has already been stated in the attached motion.

QUESTIONS PRESENTED

(1) Whether Ohio Rev. Code §2929.04(B) on it face imposes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States by giving no mitigating effect to factors such as youth, alcohol or drug intoxication, undue influence by others, mental or emotional abnormality falling short of psychosis or severe retardation, absence of prior criminal involvement, cooperation with the police, and the defendants accessorial role?

(2) Whether Ohio Rev. Code §2929.04(B), as construed and applied by the Ohio Supreme Court, gives to the factors mentioned above the mitigating effect they must have under contemporary standards of decency?

(3) Whether Ohio Rev. Code §§2929.03(E) and 2929.04(B) violate the due process clause of the Fourteenth Amendment and impose cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments by placing on the defendant the burden of proving a mitigating factor by a preponderance of the evidence, thus mandating the death penalty when it is as likely as not that a mitigating factor exists and the defendant deserves to live?

(4) Whether Ohio Rev. Code §2929.03(C) violates the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments

and imposes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments by totally precluding the jury from expressing an opinion whether, on the facts of a particular case, as measured by contemporary standards of decency, the defendant deserves to live or die?

(5) Whether the scope of review accorded death sentences by the Ohio Supreme Court is adequate under the Eighth and Fourteenth Amendments to insure that a death sentence is warranted by the facts of a particular case and is proportionate to sentences imposed in similar cases?

SUMMARY OF ARGUMENT

I. Description and facial unconstitutionality of Ohio's death-sentence scheme.

Understandably misreading Furman v. Georgia, 408 U.S. 238 (1972), Ohio's legislature enacted a death-sentence scheme that cuts discretion to the bone by mandating the death penalty when the defendant has been convicted of premeditated or felony murder along with an aggravating circumstance and the defendant thereafter fails to persuade the court by a preponderance of the evidence that a mitigating factor exists. As specified in Ohio Rev. Code §2929.04(B), the mitigating factors are (1) that the victim of the crime induced or facilitated it; (2) duress, coercion or strong provocation; and (3) that the crime was primarily the product of psychosis or mental deficiency short of the defense of insanity. On its face, §2929.04(B) ignores such obviously mitigating factors, see Harry Roberts v. Louisiana, 97 S. Ct. 1993, 1995 (1977), as youth, alcohol or drug intoxication, undue influence by others,

mental or emotional conditions falling short of psychosis or mental deficiency, absence of prior criminal involvement, cooperation with the police, and the defendant's role as an accessory rather than as the primary actor. Thus, §2929.04(B) subverts the requirement in Woodson v. North Carolina, 96 S. Ct. 2978, 2992 (1976), of a reliable determination that death is the appropriate penalty in a particular case.

II. Unconstitutional application of Ohio's death-sentence scheme.

A. Although the Ohio Supreme Court has not had occasion to apply the specified mitigating factors of victim inducement and strong provocation, it has construed and applied duress, coercion, and psychosis or mental deficiency. It has recognized that these mitigating factors are counterparts to defenses (duress, coercion, and insanity). It has also recognized that a verdict of guilty conclusively negates the defenses, thus precluding assertion of the mitigating counterparts. To keep the mitigating factors from being illusory, therefore, the Court has purported to define duress and coercion to include undue influence or domination by another, State v. Woods, 48 Ohio St.2d 127, 357 N.E.2d 1059 (1976), and mental deficiency to include any mental state or incapacity short of insanity. State v. Black, 48 Ohio St.2d 262, 358 N.E.2d 551 (1976). Further, purporting to add some factors not specified by §2929.04(B), the Court has stated that youth and absence of a prior record are relevant to determining duress or coercion, State v. Bell, 48 Ohio St.2d 270, 358 N.E.2d 556 (1976), and that youth is a primary factor in determining mental deficiency. Ibid. That these statements are no more than cosmetic is

demonstrated by the fact that the Court has upheld the death sentence in each of the twenty-five cases in which it has sustained the conviction even though some of the cases involved juveniles, persons who acted under the domination of others, persons who had no prior record, persons who had mental or emotional abnormalities including low intelligence, or a combination of these factors. Additionally, not even cosmetically has the Court given mitigating effect to alcohol or drug influence, cooperation with the police, or the defendant's accessorial role. See State v. Woods, supra; State v. Bell, supra; State v. Sandra Lockett, 48 Ohio St.2d 391, 358 N.E.2d 623 (1976).

B. The very factors that the Ohio Supreme Court has undervalued, trivialized or ignored have been recognized as justly calling for mitigation in the decisions of this Court, see, for example, Harry Roberts v. Louisiana, supra, in the Model Penal Code, and in the statutes and judicial decisions of a host of states. These sources establish the contemporary standards of decency against which Ohio's death-sentence scheme must be measured and found wanting.

III. Unconstitutionality of allocating burden of proof of mitigation to defendant.

As construed and applied by the Ohio Supreme Court, Ohio Rev. Code §§2929.03(E) and 2929.04(B) place on the defendant the burden of proving a mitigating factor by a preponderance of the evidence, thus mandating the death penalty when it is as likely as not that mitigation exists and the defendant deserves to live. State v. Downs, 51 Ohio St.2d 47, ___ N.E.2d ___ (1977). Viewed realistically rather than formalistically, absence of mitigation is an element of

capital murder under Ohio law, and the prosecution must therefore bear the burden of proof. In re Winship, 397 U.S. 158 (1970). But the prosecution must also bear the burden of proof even if absence of mitigation relates only to sentencing. The death penalty is qualitatively different from any sentence to imprisonment, regardless of length. Woodson v. North Carolina, supra. Accordingly, stringent standards of reliability are essential to insure that death is the appropriate punishment in a particular case. Ibid. Allocating the burden of proof to the defendant subverts reliability by mandating a death sentence when it is as likely as not that the defendant deserves to live. Such a result is "intolerable," Mullaney v. Wilbur, 421 U.S. 684, 703 (1975), whether measured by pure due process standards or by the standards of the Eighth Amendment.

IV. Unconstitutionality of precluding jury participation.

As a result of its misreading of Furman, the Ohio legislature enacted Ohio Rev. Code §2929.03(C) which remits the sentencing decision to the trial court and precludes even advisory participation by the jury, thus totally subverting the long-standing tradition of jury participation in the capital-sentencing process.

From a Sixth Amendment perspective, the kinds of issues raised at an Ohio mitigation hearing are well within the traditional role of juries in criminal cases, for the mitigating factors recognized by statute are counterparts to defenses. Moreover, if Ohio's law is viewed with a concern for substance rather than form, issues of mitigation go to guilt and must be jury-triable.

From an Eighth Amendment perspective, at least advisory jury participation should be

required even if mitigation relates exclusively to sentencing. Capital sentencing crucially implicates contemporary standards of decency, and the jury is a vital "link between contemporary community values and the penal system." Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15 (1968). The conscience of the community is forged in the crucible of jury-room debate; it simply cannot be replicated in the mind and heart of a single judge or panel of three.

V. Eighth Amendment inadequacy of scope of review by Ohio Supreme Court.

Reliability is a fundamental concern in the constitutionality of a death-sentence scheme. Woodson v. North Carolina, supra, at 2992. Close review of death sentences by a state's highest court serves reliability by insuring that the death penalty is appropriate when measured by the facts of a specific case and that it is proportionate to sentences imposed in similar cases. Although the Ohio Supreme Court purports to review capital sentences to insure that they are fairly imposed, State v. Bayless, 48 Ohio St.2d 73, 357 N.E.2d 1035 (1976), in fact it does not. In no instance has the Court even attempted to compare a death-sentence case with any other case in which the death sentence was imposed or averted. In no instance has the Court remanded a case for reconsideration in light of definitions espoused by the Court long after the mitigation hearing had taken place. The Court has even affirmed a death sentence while complaining that it did not have the presentence report. State v. Woods, supra. Most importantly, the Court has adopted a standard of review that requires affirmance unless no reasonable mind could reach the same conclusion, State v. Edwards, 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976), a

standard that avoids only the most blatant errors, a standard that precludes the Court from making the kind of judgment about comparative blameworthiness that Woodson requires. It is thus hardly surprising that the Court has affirmed the death sentence in every case in which it has upheld the conviction.

ARGUMENT

I. INTRODUCTION: RECENT HISTORY DESCRIPTION AND FACIAL UNCONSTITUTIONALITY OF OHIO'S DEATH-SENTENCE SCHEME.

Prior to January 1, 1974, the effective date of Ohio's new criminal code, eight crimes were punishable by death: first-degree murder (defined as purposely killing another either with premeditated malice, or by poison, or during the course of specified felonies), Ohio Rev. Code §2901.01 (Page 1954) (repealed, 1-1-74); killing another by maliciously obstructing a railroad, §2901.02; the killing of a guard or custodial officer by a prisoner, §2901.03; purposely killing a police officer who was in the execution of his duties, §2901.04; willfully killing the president, vice-president, or other person in line of succession, §2901.09; willfully killing a governor or lieutenant-governor, §2901.10; kidnapping for purposes of extortion or ransom a person who was not liberated unharmed prior to trial, §2901.27; and abduction resulting in death, §2901.28. The death penalty was mandatory for the two offenses involving governmental officials. For the remainder, either a death sentence or life imprisonment was imposed pursuant to a system of uncontrolled discretion that fell in the wake of Furman v Georgia, supra.

On June 23, 1965, the Ohio Legislative Service Commission, the legislature's research and drafting arm, was directed to prepare a comprehensive study of Ohio's substantive criminal law. The project terminated six years later with the introduction of a criminal law reform bill that contained new death penalty provisions.[1] As approved by the Ohio House, the bill abolished both the mandatory death penalty for killing political officials and the existing system of uncontrolled discretion. In their stead, the House approved a bill closely patterned after Model Penal Code §210.6 (Prop. Off. Draft 1962). The House-approved measure specified a wide range of mitigating factors, but even that list was not exclusive, and all relevant evidence was admissible. The system was one of controlled discretion. See Memorandum from Ohio Legislative Service Commission to Ohio Senate Judiciary Committee, Sept. 11, 1972, at 2-3. The House-passed measure was pending in the Senate Judiciary Committee on the date that Furman was decided.

Concerned that the House version of guided discretion would not pass muster under Furman (a fear that was proved baseless by Gregg v. Georgia, 96 S. Ct. 2909 (1976), and companion cases), the Senate drastically narrowed the list of mitigating factors and

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[1] Ohio maintains but sparse legislative histories. The discussion above is based on Lehman and Norris, Some Legislative History and Comments on Ohio's New Criminal Code, 23 CLEVE. ST. L. REV. 8 (1974). The discussion of the death penalty provisions is found id. at 15-23. The authors were, and still are, Ohio legislators, and Rep. Norris was a co-sponsor of the original bill.

removed all sentencing discretion. The Senate's version prevailed, and, as ultimately enacted, Ohio's statutes mandate the death penalty if certain conditions occur. The first condition is that the defendant must be charged with and found guilty of aggravated murder in violation of Ohio Rev. Code §2903.01 (1975).[2] The second condition is that the defendant must be charged with and found guilty of one or more of the seven additional aggravating circumstances enumerated in §2929.04(A).[3]

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[2] Aggravated murder is defined as follows:

a) No person shall purposely, and with prior calculation and design, cause the death of another.

b) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated robbery, aggravated burglary or burglary, or escape.

Although the statute requires the mens rea of purpose to kill, even for felony murder, it has been interpreted by the Ohio Supreme Court so loosely that recklessness or even negligence may suffice. See State v. Sandra Lockett, 48 Ohio St.2d 48, 358 N.E.2d 1062 (1976).

[3] In the terminology used by Ohio lawyers, this is referred to as a "specification," in contrast to the basic "charge" of aggravated murder. The aggravating circumstances are (1) that the offense was the assassination of a specified office-holder or candidate for office; (2) that the offense was committed for hire; (3) that the offense was committed for the purpose of escaping detection, (Cont.)

Once these conditions have been met, the jury is discharged, §2929.03(C), and a mitigation phase begins. This phase is strictly a bench proceeding; there is no jury input whatsoever. A presentence investigation and psychiatric examination of the defendant are required, and the court must hear testimony and other evidence, if any. §2929.03(D). Then, §2929.03(E) calls upon the court to determine whether the defendant has established by a preponderance of the evidence, State v. Downs, 51 Ohio St.2d 47, 55, ___ N.E.2d ___, ___ (1977), one or more of the mitigating factors specifically enumerated in §2929.04(B).[4]

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[3] apprehension, trial or punishment for another offense committed by the offender; (4) that the offense was committed while the offender was a prisoner in a detention facility; (5) that the offender has previously been convicted of an earlier offense the gist of which was the purposeful killing or attempted killing of another, or that the offense involved the purposeful killing of or attempt to kill two or more persons; (6) that the victim was known by the offender to be a law enforcement officer, and either (a) the victim was engaged in his duties at the time of the offense or (b) it was the offender's specific purpose to kill a law enforcement officer; and (7) that the offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

[4] The mitigating factors are (1) that the victim of the offense induced or facilitated it; (2) that it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation; and (3) that the offense was primarily the product of the offender's psychosis or mental deficiency (Cont.)

If the court determines that the defendant has established none of the mitigating factors by a preponderance, the death penalty is mandatory. If the court finds that one or more of the factors have been established, the death penalty is precluded and a life sentence must be imposed.

Cases in which the death sentence has been imposed are reviewable as a matter of right in the intermediate appellate court. If that court affirms the death sentence, the case is reviewable as a matter of right in the Ohio Supreme Court. Since January 1, 1974, seventy-six persons have been sentenced to death in Ohio. Columbus Citizen-Journal, July 14, 1977, p. 13, col. 3. As of July 31, 1977, the Ohio Supreme Court had reviewed twenty-six death sentence cases. In one case, State v. James Lockett, 48 Ohio St.2d 71, 358 N.E.2d 1077 (1976), the Court set aside the conviction and sentence for evidentiary error unrelated to the penalty. In the other twenty-five cases, the Court affirmed the conviction and the death sentence.[5] In no case has the Ohio Supreme Court affirmed the conviction but set aside the death sentence.

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[4] although such condition is insufficient to establish the defense of insanity.

[5] In order of decision, the cases are State v. Bayless, 48 Ohio St.2d 73, 357 N.E.2d 1035 (1976); State v. Strodes, 48 Ohio St.2d 113, 357 N.E.2d 375 (1976); State v. Woods, 48 Ohio St.2d 127, 357 N.E.2d 1059 (1976)(two cases); State v. Hancock, 48 Ohio St.2d 147, 358 N.E.2d 273 (1976); State v. Roberts, 48 Ohio St.2d 221, 358 N.E.2d 530 (1976); State v. Black, 48 Ohio St.2d 262, 358 N.E.2d 551 (1976); State v. Bell, 48 Ohio St.2d 270, 358 N.E.2d 556 (1976); State v. Bates, 48 Ohio St.2d 315, 358 N.E.2d 554 (1976); State v. Hall, 48 Ohio St.2d (Cont.)

In Woodson v. North Carolina, 96 S. Ct. 2978, 2992 (1976), this Court recognized that, in determining the constitutionality of a death-sentence scheme, a key issue is whether it permits a reliable "...determination that death is the appropriate punishment in a specific case." More importantly, observing that "...death is qualitatively different from a sentence of imprisonment, however long," this Court found "...a corresponding difference in the need for reliability...." Ohio's law is not identical to North Carolina's invalidated law. Nevertheless, both substantively and procedurally, it is unconstitutional on its face in terms of reliability.

From a substantive standpoint, Ohio's statutes ignore such obviously mitigating factors, see Harry Roberts v. Louisiana, 97 S. Ct. 1993, 1995 (1977), as youth, alcohol or drug intoxication, undue influence by others, mental or emotional abnormality

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5/ 325, 358 N.E.2d 590 (1976); State v. Harris, 48 Ohio St.2d 351, 359 N.E.2d 67 (1976); State v. Royster, 48 Ohio St.2d 381, 358 N.E.2d 616 (1976); State v. Lytle, 48 Ohio St.2d 391, 358 N.E.2d 623 (1976); State v. Perryman, 49 Ohio St.2d 14, 358 N.E.2d 1040 (1976); State v. Sandra Lockett, 49 Ohio St.2d 48, 358 N.E.2d 1062 (1976); State v. Lane, 49 Ohio St.2d 77, 358 N.E.2d 1051 (1976); State v. Alberta Osborne, 49 Ohio St.2d 135, 359 N.E.2d 78 (1976); State v. Miller, 49 Ohio St.2d 198, 361 N.E.2d 419 (1977); State v. Carl Osborne, 50 Ohio St.2d 211, ___ N.E.2d ____ (1977); State v. Weind, 50 Ohio St.2d 224, ____ N.E.2d ____ (1977); State v. Jackson, 50 Ohio St.2d 253, ____ N.E.2d ____ (1977); State v. Downs, 51 Ohio St.2d 47, ____ N.E.2d ____ (1977); State v. Shelton, 51 Ohio St.2d 68, ____ N.E.2d ____ (1977); State v. Williams, 51 Ohio St.2d 112, ____ N.E.2d ____ (1977).

falling short of psychosis or mental deficiency, absence of prior criminal involvement, cooperation with the police, and the defendant's role as an accessory rather than as the primary actor. From a procedural standpoint, Ohio's statutes make the defendant bear the burden of proving, by a preponderance, the existence of one of the statutorily recognized mitigating factors, thus mandating the death penalty when it is as likely as not that a mitigating factor exists. State v. Downs, supra. Moreover, sentencing is the exclusive province of the bench, and the jury is therefore totally precluded from expressing an opinion whether, under contemporary standards of decency, the death penalty is justly or appropriately supported by the facts of the case. Finally, although all death cases are reviewed, Ohio's statutes are silent as to scope of review, and there is thus no legislative mandate that appellate courts review the evidence to insure that a death sentence in a particular case is warranted by the facts and that it is compatible with sentences imposed in similar cases. Whether these profound deficiencies in Ohio's death-penalty statutes have been cured by judicial interpretation is the critical issue in the case at bar. We address it under the headings that follow.6/

6/ Although this brief focuses on the mitigation aspect of appropriateness of punishment, Ohio's statutes are also deficient in terms of aggravation. As noted earlier, §2929.04(A)(7) specifies felony-murder as an aggravating circumstance. With reference to this circumstance, Amicus respectfully suggests to the Court that the legislative formulation is arbitrary and irrational in violation of due process standards. As indicated above, the death penalty is conditioned on the defendant being found guilty of (Cont.)

to above, it is hard to confine a resolution of the issues to a single case, for what is involved is not only how Ohio's law was applied in the isolated setting of one case, but also the rationality, fairness, and basic decency of Ohio's statutory scheme as construed and applied by the Ohio Supreme Court in a wide range of cases. Gregg v. Georgia, supra at 2938. Amicus respectfully submits that, even considered with its judicial gloss, Ohio's law still affronts the concerns underlying Woodson v. North Carolina, supra; Stanislaus Roberts v. Louisiana, 96 S.Ct. 3001 (1976); and Harry Roberts v. Louisiana, supra, and is therefore unconstitutional.

6/ allegations of purpose and calculation -- for example, that the killing was for hire. §2929.04(A)(2). Then, and only then, has capital murder been alleged. There can be no rational justification for saying that a planned, cold-blooded killing requires a wholly new element to become capital murder, but that a felony-killing becomes capital merely by realleging the identical felony-killing as an aggravating specification. Whatever the standards of due process may be in a run-of-the-mill criminal case, surely a higher degree of rationality and fairness must be achieved by the legislature when its formulation results in the penalty of death. Cf. Woodson v. North Carolina, supra.

Amicus concedes that this issue was not raised below. It was however, presented to the Ohio Supreme Court at pp. 9-10 of a brief filed by Amicus in State v. Carl Osborne, supra note 5. That Court totally ignored the issue in its Osborne opinion and has continued to ignore the issue in every subsequent capital opinion. That the issue is highly significant is apparent from the fact that most of the cases reviewed to date by the Ohio Supreme Court have involved a charge of felony-murder with an aggravating specification of the identical felony-murder.

A. As construed and applied by the Ohio Supreme Court, the mitigating factors explicitly recognized by Ohio Rev. Code §2929.04(B) are inordinately narrow, and little or no mitigating effect is given to such factors as youth, alcohol or drug intoxication, undue influence by others, mental or emotional abnormality falling short of psychosis or severe retardation, absence of prior criminal involvement, cooperation with the police, and the defendant's accessorial role.

Ohio Rev. Code §2929.04(B) explicitly recognizes three categories of mitigating factors. A brief consideration of each category and, where available, its judicial gloss will show that Ohio's scheme is virtually bereft of mitigation.

(1) Ohio Rev. Code §2929.04(B)(1) deems mitigating that the victim of the offense induced or facilitated it. This mitigating factor has not arisen in any reported case. Nor is it ever likely to arise, for it is illusory. In the absence of judicial interpretation, we must make the educated guess that the factor is limited to mercy killing, for that seems to be its plain meaning. It strains credulity to posit that a mercy killer would even be charged with aggravated murder, let alone be convicted of it. Of greater importance, however, is the fact that no mitigating factor becomes relevant until the defendant has also been convicted of one or more of the aggravating specifications listed in §2929.04(A). The aggravating circumstances, however, are so inconsistent with mercy killing, that conviction of any

aggravating specification will preclude the defendant from claiming mercy killing. To illustrate the point, we refer to §2929.04(A)(7)'s aggravating specification of felony-murder which is the most common form of aggravation under Ohio law. One who has been convicted of aggravated murder and an additional specification of felony-murder of the same victim will simply never be able to assert mercy killing. What is true of the aggravating circumstance of felony-murder is also true of the other aggravating circumstances. Hence, mitigating inducement is illusory.[7/]

[7/] The statements made above may have to be tempered a bit in light of the unreported opinion of the Ohio Court of Appeals for the Fifth District (Ashland County) in the consolidated cases of State v. Hines, No. CA-634 (Feb. 25, 1977); and State v. Lucas, No. CA-639 (Feb. 25, 1977). The defendants were inveigled into a robbery scheme by one Rice. Rice introduced the defendants to Vanover as sellers of marijuana which Vanover wanted to buy. Learning from Rice that Vanover would be armed, the defendants armed themselves. When Vanover realized that he had been set up for a robbery, he attempted to flee. To stop him, one of the defendants fired into the air. Vanover then fired at the defendants who returned the fire, killing Vanover at close range. The Court of Appeals reversed the death sentences, holding as a matter of law that the victim had induced or facilitated the felony-murder by his willingness to participate in an unlawful transaction and by being armed. Id. at 52-3. The Court also threw into the balance that the defendants had been inveigled by Rice (who had become a witness for the State), id. at 56, and that the defendants were "...self indulged, drug oriented, youthful failures of marginal intelligence but with no history or pattern of violence." Id. at 57.
(Cont.)

(2) Ohio Rev. Code §2929.04(B)(2), a section involved in the case at bar, provides for mitigation if "it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation." This section was first construed and applied by the Ohio Supreme Court in State v. Woods, 48 Ohio St.2d 127, 357 N.E.2d 1059 (1976) (Petition for a Writ of Certiorari filed March 21, 1977, No. 76-1308). In Woods, the Court recognized (1) that the most common type of aggravated murder in Ohio is felony-murder; (2) that, whether or not duress and coercion are defenses to murder in general, they are defenses in Ohio to the felony that underlies felony-murder; (3) that a felony-murder defendant who prevails on the claim of duress in Ohio is not guilty of a capital offense; (4) that, if a defendant has been found guilty of felony-murder (as he must for the offense to be capital), the verdict necessarily decides beyond a reasonable doubt that duress did not exist; (5) that such a verdict would preclude the defendant from establishing at the mitigation hearing that he was under duress; and (6) that, unless the terms "duress" and "coercion", as mitigating factors, were given a meaning

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7/ Although Amicus applauds the result of this case, it is inconsistent with a plethora of Ohio Supreme Court decisions that will be discussed later in this brief, importantly including the decision in the instant case. Amicus has learned, however, that the prosecution did not appeal, thus precluding further review.

Even if the opinion were not inconsistent with Ohio Supreme Court decisions, it would have little, if any, impact. In addition to being unreported, it deals with a rarely occurring fact situation.

different from their meaning as defensive factors, mitigating duress and coercion would be a "virtual nullity." 48 Ohio St.2d at 135, 357 N.E.2d at 1065. Accordingly, the Court interpreted mitigating duress and coercion to include domination by another or undue influence. 48 Ohio St.2d at 136-7, 357 N.E.2d at 1066.

In applying its own definition, however, the Court eviscerated it. Ignoring the evidence that Woods was easily led and dominated by others, that he had no prior record, and that he probably would not have committed the crime had he not been under duress, 48 Ohio St.2d at 134, 357 N.E.2d at 1064, the Court held, seemingly as a matter of law, that Woods was not under duress, as newly defined, because he did not take advantage of an opportunity to abandon the robbery, refrain from shooting, surrender to police, or flee. 48 Ohio St.2d at 138, 357 N.E.2d at 1066.

The approach taken by the Ohio Supreme Court in Woods (generous definition followed by eviscerating application) was continued in the case at bar, State v. Bell, 48 Ohio St.2d 270, 358 N.E.2d 556 (1976). In Bell, the Court purported to add to the factors specifically recognized in §2929.04(B) by holding that youth and absence of a prior record were relevant considerations.8/ 48 Ohio St.2d at 281, 358 N.E.2d at 564. Then,

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8/ The Court's statement in Bell regarding youth and absence of a prior record contradicts the statement it made less than a month before in State v. Bayless, 48 Ohio St.2d 73, 87 n. 2, 357 N.E.2d 1035, 1046 n. 2 (1976), that "The major differences [between the statutory schemes of Ohio and Florida] are that the Florida statute permits consideration (Cont.)

ignoring the evidence that Bell was 16, 48 Ohio St.2d at 270, 358 N.E.2d at 559, and that he was easily led by his older companion, Hall, the Court affirmed the death sentence on the ground that Bell did not get away from Hall when he could have, and that he joined Hall in another criminal venture the next day. 48 Ohio St.2d at 282, 358 N.E.2d at 364-65.

The Court's most recent application of mitigating duress or coercion came in State v. Weind, 50 Ohio St.2d 224, 231, ___ N.E.2d ___, ___ (1977). There, the Court stated that, "although the defendant may have acted under a strong domination or persuation," the mitigating factor had not been proved in light of other evidence "which suggests that his acts were voluntary."[9]

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[8] of the age and prior criminal record of the defendant, of more broadly defined mental and emotional disturbances and impairments, and of the fact that the defendant was an accomplice with only a minor role in the crime."

It should also be noted that the defendant in State v. Woods, supra, had no prior record, but that fact availed him nothing.

[9] See also the companion case of State v. Carl Osborne, 50 Ohio St.2d 211, ____ N.E.2d ____ (1977), in which the evidence at the mitigation hearing established the likelihood that the defendant had acted under the strong influence of his mother at whose behest he had killed her paramour's wife. In its opinion, the Ohio Supreme Court did not even take the trouble to state the evidence of mitigation. Amicus' knowledge of this case comes from its participation in the Ohio Supreme Court proceedings. Amicus has been informed by counsel for Osborne that a Petition for a Writ of Certiorari is being prepared.

In neither Woods, Bell, nor Weind did the Court recognize that it had undone its own effort to expand the definition of duress and coercion and had made the mitigating factor virtually illusory. In the first place, one who is easily led or unduly influenced by another is simply not likely to abandon the relationship, for maintaining it is part and parcel of the condition. Thus, it is hard to imagine a case the facts of which would ever satisfy the Court's insistence on abandonment. Moreover, by requiring abandonment as an element of mitigating duress or coercion, the Court has read into the mitigating factor an element of the defense, State v. Good, 110 Ohio App.415, 165 N.E.2d 28 (1960)(syllabus 4), thus collapsing the distinction between the two as a matter of law. Finally, the very conviction for capital murder assures that the mitigating factor will fail under Weind, for it establishes beyond a reasonable doubt that the defendant acted voluntarily.

In Woods, the Ohio Supreme Court claimed to be concerned lest it interpret the mitigating factor of duress or coercion so narrowly as to make it a virtual nullity. Thus, it defined the factor to include undue influence or domination by another. Yet, in applying its own definition in Woods, Bell and Weind, it has done precisely what it sought to avoid. Once the felicitous verbiage is pierced and attention is paid to hard results, it is clear that mitigating duress and coercion are useless. As applied by the Ohio Supreme Court, neither concept permits the sentencer to make the kind of judgment about comparative blameworthiness that Woodson and the two Roberts cases require. The Woods and Bell cases are the clearest evidence of this. Each dealt with an incident that involved joint participants

of significantly different blameworthiness. Yet, each participant was sentenced to death, and the Ohio Supreme Court upheld each death sentence.

The third mitigating factor mentioned in §2929.04(B)(2) is "strong provocation." This factor has not been interpreted in any reported case, so we cannot be certain of its scope. Nevertheless, it is a fact that strong provocation cannot exist in conjunction with some of the aggravating circumstances -- for example, that the killing was for the purpose of escaping detection -- and it is unlikely that "strong" provocation would exist in conjunction with others -- for example, killing for hire or, to refer again to the most common example, felony-murder. Beyond this, however, is the fact that, under Ohio Rev. Code §2903.03, a killing that would otherwise be murder is reduced to manslaughter if it resulted from "...extreme emotional stress brought on by serious provocation reasonably sufficient to incite [the defendant] into using deadly force..." In the absence of relevant case law, the relationship between reductive provocation and mitigating provocation cannot be illuminated. It is clear, however, that, if the Ohio Supreme Court either interprets or applies mitigating provocation narrowly, it will be swallowed up by reductive provocation and will cease to exist. Given the already narrow application of duress and coercion, that is quite likely to occur.

(3) Ohio Rev. Code §2929.04(B)(3), also involved in the case at bar, treats as mitigating that the crime "...was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." The question raised by this section is whether its definition of

mitigating mental condition differs in any significant respect from Ohio's case-law definition of insanity as a defense. If it does not, then a verdict that the defendant is guilty of capital murder, which necessarily entails a finding beyond a reasonable doubt that he was sane, would effectively preclude the defendant from asserting this form of mitigation. Cf. State v. Woods, supra at 135, 357 N.E.2d at 1065.[10]

From the face of §2929.04(B)(3), it is clear that the legislature intended to distinguish mitigating from exculpating mental condition. The question, however, is not what the legislature intended, but whether it succeeded, and, if not, whether the legislative failure has been rectified by judicial interpretation and application.

Ohio's insanity defense is defined as follows:

> One accused of criminal conduct is not responsible for such criminal conduct if, at the time of such conduct, as a result of mental disease or defect, he does not have the capacity either to know the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

State v. Staten, 18 Ohio St.2d 13, 247 N.E.2d 293 (1969)(syllabus 1). This definition surely suggests no easy differentiation

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10/ In State v. Humphries, 51 Ohio St.2d 95, ____ N.E.2d ____ (1977), the Ohio Supreme Court held that once the defendant offers some evidence in support of the insanity defense, the prosecution must prove beyond a reasonable doubt that the defendant was sane at the time of the act.

from mitigating mental condition (whether the crime "was primarily the product of the offender's psychosis or mental deficiency"). Thus, if there is any difference between them, it must reside in Ohio's case law.

The Ohio Supreme Court has dealt with mitigating mental condition in a number of capital cases. Far from articulating a distinction between mitigation and exculpation, however, the cases, taken as a whole, so confound matters that, either the mitigating mental condition is illusory, engulfed by Ohio's insanity defense, or it is unconstitutionally vague as a result of the very judicial gloss that has been given to it.

In State v. Bayless, supra, the Court recognized that the words "psychosis or mental deficiency" do not cover all "mental disorders," 48 Ohio St.2d at 87, 357 N.E.2d at 1046, and it limited "mental deficiency" to low intelligence or retardation. 48 Ohio St.2d at 95-6, 357 N.E.2d at 1050-51. This traditionally narrow definition means that "mental deficiency" is a "mental disease or defect" as those words are used in defining the defense of insanity. Because the same is obviously true of "psychosis," Bayless blurs, rather than sharpens, the distinction between mitigation and exculpation.

Perhaps recognizing that it had failed to make a crucial distinction in Bayless, the Court tried again in State v. Black, 48 Ohio St.2d 262, 358 N.E.2d 551 (1976). There, the Court conveniently ignored what it had said less than a month before in Bayless and stated that the statutory language accorded the sentencer "the broadest possible latitude in the examination of the defendant's mental state or mental capacity," and that "any mental state or incapacity may

be considered" short of the defense of insanity. 48 Ohio St.2d at 268, 358 N.E.2d at 555-56. Indeed, the Court even refused to define "psychosis or mental deficiency" on the ground that "to define such terms is to narrow them," 48 Ohio St.2d at 268, 358 N.E.2d at 556, either failing to recognize or ignoring the obvious: that not defining the terms abandons each sentencing judge to an uncharted sea that most conduces to the freakish or wanton imposition of the death penalty. Cf. United States v. Park, 421 U.S. 658, 679-82 (1975)(dissenting opinion by Stewart, J.) But that is not the only deficiency in the Court's formula. Of far greater consequence is the fact that the Court has applied the broad language of Black in the narrowest way (doing to mitigating mental condition precisely what it had done to mitigating duress in Woods, Bell and Weind, supra), thus destroying the very distinction it purported to draw in Black between mitigation and exculpation.

As already noted, the Court's expansive statement in Black is inconsistent with its earlier statement in Bayless. It is also inconsistent with the holding in Bayless. Bayless was dull normal, emotionally and culturally deprived, and subnormal in emotional control and conscience. 48 Ohio St.2d at 94, 357 N.E.2d at 1049-50. Had the Court meant what it said in Black, it would have had to reconsider Bayless. Nevertheless, having interpreted mitigating mental condition in Black much more broadly than it had in Bayless, the Court did not reconsider Bayless and apply the newly formulated standard to its facts. Rather, it ignored Bayless altogether, relegating it to the earlier and less generous standard. This could, of course, be simply a matter of inadvertence. On the other hand, it could be an indication that the broad language of

Black is only cosmetic. A consideration of cases decided since Black strongly supports the latter.

In the case at bar, the Court purported to continue its broad interpretation of psychosis or mental deficiency by holding not only that the defendant's age could be considered in determining whether he had a mitigating mental condition, but also that age was a "primary factor" in the determination. 48 Ohio St.2d at 282, 358 N.E.2d at 565. It is, of course, true that old age may cause brain deterioration and consequent mental deficiency. But it is hardly likely that a senile person would even be charged with aggravated murder, let alone be convicted of it. In terms of the real world, it is youth, rather than old age, that will be asserted as mitigating in a capital case. The Court did say in Bell that youth, too, was a "primary factor" in determining mitigating mental condition, but the Court did not explain how that could possibly be the case, and no obvious explanation suggests itself. Moreover, as already noted in the discussion of duress, Bell was 16 at the time of the crime. Yet, having posited youth as a "primary factor" in determining mitigating mental condition, the Court upheld the death sentence. Not only did the Court ignore the defendant's youth, it ignored the additional evidence that Bell had subnormal intelligence, see Petition for Writ of Certiorari at 23, that he lacked family or other adequate supervision, that he had been sent to a school for abnormally difficult children, that he had been under the influence of mescaline and marijuana at the time of the crime (R. 503, 506-7), and that he had taken drugs daily for three years preceding the crime (R. 503).

But the story does not end with Bell. In State v. Harris, 48 Ohio St.2d 351, 359 N.E.2d 357 (1976), the Court upheld a death sentence imposed on a juvenile sociopath; in State v. Royster, 48 Ohio St.2d 381, 358 N.E.2d 616 (1976), it affirmed the sentence in a case involving a defendant whose I.Q. scores of 75, 61 and 54 were attributed to "developing characteristic traits" and unwillingness to cooperate, id. at 389-90, 358 N.E.2d at 622; in State v. Edwards, 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976), it sustained a sentence imposed on one who was of below average intelligence and educationally deficient; and in State v. Sandra Lockett, 49 Ohio St.2d 48, 358 N.E.2d 1062 (1976), it upheld a death sentence imposed on an accomplice (the driver of the getaway car) whose I.Q. was variously evaluated as slightly above average, low average, and borderline mental retardation.

Had the Court really meant what it said in Black, it is inconceivable that it would not have set aside the death sentence in at least one of these cases, especially Bell. That it did not do so in any of the cases is the most eloquent evidence that the generous language of Black is a sham. The inevitable result is, as stated earlier, either that the mitigating mental condition is illusory, devoured by Ohio's insanity defense, or that if there is a difference between the two, it has been so poorly articulated by the Ohio Supreme Court that the mitigating condition cannot be applied even-handedly as a result of the confusing judicial gloss that has been given to it.

(4) In the preceding subdivisions of part II A of this Brief, we addressed the mitigating factors explicitly enumerated in Ohio Rev. Code §2929.04(B) in order to demonstrate that, as interpreted and applied

by the Ohio Supreme Court, the factors are either illusory or intolerably narrow at best. In the present subdivision, we address other language of §2929.04(B) which requires the sentencer to determine whether, "considering the nature and circumstances of the offense and the history, character, and condition of the offender," a statutory mitigating factor has been established by the defendant. Under cover of the quoted words, the Ohio Supreme Court has stated, as indicated above, that the defendant's youth is relevant to determining mitigating duress, coercion or mental condition; that absence of a prior record is relevant to the determination of duress and coercion; that duress includes undue influence or domination by another; and that mental deficiency is to be broadly defined. The insubstantiality of these statements is manifest, for in no case has the Court set aside a death sentence where the defendant was young, had no prior record, acted under the influence of another, or had any mental abnormality. Moreover, in no case has the Court even deemed relevant that the defendant was intoxicated, State v. Bell, supra, or cooperated with the authorities, ibid., or played but an accessory's role, State v. Sandra Lockett, supra. Finally, in no case has the Court regarded any combination of these factors as mitigating. See State v. Woods, supra; State v. Bell, supra; State v. Sandra Lockett, supra. Thus, it is clear that, although the quoted words might, on their face, be regarded as a constitutionally saving grace, they avail nothing as applied by the Court.

(5) The teaching of the second round of death penalty cases in conjunction with Harry Roberts v. Louisiana, supra, is twofold: that a capital-sentencing scheme of broad mitigation coupled with guided discretion is

constitutional, but that a scheme without any mitigation is not. On a spectrum running from the valid laws of Georgia, Florida and Texas, at one end, to the unconstitutional laws of North Carolina and Louisiana, at the other, Ohio's law lies quite close to the latter, albeit not at the identical point. Whether it lies too close to that point to pass constitutional scrutiny is a critical issue in the case at bar. We address that issue immediately below.

B. Contemporary standards of decency require that mitigating effect be given to the factors that are ignored or grossly undervalued by Ohio's death-penalty scheme.

In Harry Roberts v. Louisiana, supra at 1995, this Court summarized its prior holdings in the following terms:

> In Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944, this Court held that "...the fundamental respect for humanity underlying the Eighth Amendment...requires consideration of the character and record of the individual offender and the circumstances of a particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." In [Stanislaus] Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974, we made clear that this principle applies even where the crime of first-degree murder is narrowly defined.

After observing that there was a legitimate interest in dealing harshly with aggravated murders, this court continued, in terms directly applicable to the case at bar:

But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a police officer and which are considered relevant in other jurisdictions.

As we emphasized repeatedly in [Stanislaus] Roberts and its companion cases decided last Term, it is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense (97 S.Ct. at 1995-96) (footnotes ommitted; emphasis added).

To be constitutional, therefore, a death-sentence scheme must, in addition to identifying aggravating circumstances, afford the sentencer a "meaningful opportunity" to assess and weigh in the balance "the past life and habits of a particular offender" as well as his "character and propensities." Woodson, supra at 3006. It is against these standards that Ohio's scheme must be measured.

Given the polar extremes at which the decided cases lie, it has not yet been necessary for this Court to identify the mitigating factors that are constitutionally indispensable. However, the enumeration in

Harry Roberts, supra, is simply too pointed to be ignored, and would, standing alone, be ample basis for declaring unconstitutional Ohio's scheme which, as the case at bar compellingly demonstrates, trivializes to the vanishing point almost all of the factors specifically mentioned by this Court. But if further support is necessary, Amicus suggests that it may be found in a consideration of the statutes that were upheld in Gregg v. Georgia, supra; Proffitt v. Florida, 96 S.Ct. 2960 (1976); and Jurek v. Texas, 96 S.Ct. 2950 (1976), and in the statutes of other states, as well. This Court itself observed in Woodson, supra at 2987, that what was at stake in Eighth Amendment death-penalty litigation was "ascertaining contemporary standards of decency," and that "legislative measures adopted by the people's chosen representatives weigh heavily" in making that judgment.

For ease in dealing with the procedures of Georgia, Florida and Texas, we shall assume that the defendant has been tried by jury. Under Georgia's bifurcated procedure, the first stage involves guilt determination, and the only question is whether the defendant committed an offense punishable by death. Gregg, supra at 2920, 2936. If that question is answered in the affirmative, the trial moves to the second stage -- sentencing -- which also takes place before the jury. The jury is first asked to determine whether one of ten specified aggravating circumstances has been proved beyond a reasonable doubt. If the answer is no, the death penalty is precluded. Id. at 2919, 2936. If the answer is yes, however, the death penalty is not mandatory; rather it resides with the discretion of the jury. In exercising that discretion, the jury must consider mitigating circumstances. Id. at 2919, 2921, 2936. However, the jury need not find any

mitigating circumstance in order to make a binding determination of mercy. Id. at 2936. Although only one mitigating circumstance appears to be specified by statute -- absence of a prior record, id. at 2920 -- it is clear that the scope of mitigation is wide. "The defendant is accorded substantial latitude as to the types of evidence that he may introduce." Ibid.

> ...the jury's attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment (e.g., his youth, the extent of his cooperation with the police, his emotional state at the time of the crime) (id. at 2936) (footnote omitted) (emphasis added).

That Georgia's mitigating circumstances are not statutorily specified makes it somewhat hard to control the sentencer's discretion. That fact, however, was not viewed by this Court as a constitutional deficiency:

> So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision (id. at 2939) (emphasis added).

Under Florida's procedure, the defendant's guilt of a capital offense is determined at the first stage of a bifurcated trial. The presentence stage, which occurs before the jury, deals with aggravating and

mitigating circumstances. Proffitt, supra at 2965. Both aggravating and mitigating circumstances are specified by statute. The specified mitigating circumstances are (1) absence of a significant criminal history; (2) influence of extreme mental or emotional disturbance; (3) victim's consent or participation; (4) defendant's minor role as an accomplice; (5) extreme duress or substantial domination by another person; (6) substantially impaired mental capacity; and (7) defendant's age at the time of the crime. Ibid. This list, however, is apparently not exclusive. Id. at 2964, 2965 n. 8. After hearing the aggravating and mitigating evidence, the jury decides by majority vote whether the defendant should live or die. The jury's decision, however, is advisory. Id. at 2965. It is the trial judge who has the final authority. In exercising that authority, however, the judge is also required to balance the aggravating and mitigating circumstances, he is required to make written findings in support of any death sentence, and he may reject the jury's recommendation of life only if "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ." Ibid., quoting Tedder v. State, 322 So.2d 908, 910 (Fla. 1975).

Under the bifurcated procedure in Texas, the first stage is devoted to ascertaining whether the defendant committed a capital offense which, under Texas law, is defined in terms of aggravating circumstances. Jurek, supra at [illegible]5. Once the defendant has been found g[illegible]y, the presentence stage is reached. [illegible]t th[illegible] stage the jury is required to answer three questions: (1) whether the defendant killed deliberately and with reasonable expectation that death would result from his act; (2) whether it is probable that the defendant will commit violent acts constituting a continuing threat to society;

and (3) if raised by the evidence, whether the killing was an unreasonable response to provocation by the victim. Ibid. Only if the jury unanimously finds that the prosecution has proved an affirmative answer to each of these questions beyond a reasonable doubt, must the death sentence be imposed. Ibid.

Although the Texas statutory procedure does not mandate a consideration of mitigating factors, the Texas Court of Criminal Appeals has construed the second statutory question (probability of future violent acts) to permit a wide-ranging inquiry into mitigating factors such as prior record, prior efforts at rehabilitation, age, duress, mental or emotional pressure, and whether the defendant acted under the domination of another. Id. at 2957. As a result, the defendant is permitted "to bring to the attention of the jury whatever mitigating circumstances he may be able to show." Id. at 2956. Squarely for that reason, the Texas statute was upheld by this Court. Harry Roberts v. Louisiana, supra at 1996 n. 6.11/

11/ Amicus anticipates that the State of Ohio will attempt to analogize Ohio's law to that of Texas by arguing (1) that, although the factors of youth and absence of a prior record have no independent mitigating effect in Ohio, the Ohio Supreme Court has said that they can be considered in determining whether a statutorily enumerated mitigating factor exists; (2) that, under Texas law, mitigating factors such as youth also have no independent mitigating effect, but can only be considered in the context of the second statutory question; and (3) that the Ohio and Texas laws are therefore substantially similar.

To the extent that the anticipated argument rests on what the Ohio Supreme Court has said (Cont.)

Although the Georgia, Florida and Texas procedures differ in some respects, they are remarkably similar in requiring the sentencer to consider the broadest range of mitigating circumstances including the very factors that Ohio's statute, as interpreted by the Court below, grossly devalues or ignores. It is

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11/ (generous definition), it is fully answered by what the Court has done (eviscerating application). More importantly, however, the argument fundamentally misconceives the operation of a Texas mitigation hearing. The very ambiguity of the second statutory question allows for "play in the joints," Crump, Capital Murder: The Issues in Texas, 14 HOUSTON L. REV. 531, 555 (1977), as a result of which the Texas mitigation hearing is a wide-open inquiry into justness of punishment or whether the defendant is rehabilitable based on all of the facts of the case. All evidence relating to mitigation is admissible, see id. at 561, et seq., and Texas defense lawyers have even been permitted to argue against the death penalty in concept. Id. at 577. Thus, although Texas statutory law ostensibly confines mitigation evidence to a narrow channel, mitigation hearings are in fact conducted in precisely the opposite way.

Beyond this, however, is the fact that the Ohio Supreme Court has yet to say even cosmetically that factors such as intoxication, drug influence, cooperation with the police and accessoryship can be considered for any mitigating purpose. Finally, there is the stark fact that the Texas procedure is slanted toward life while Ohio's is slanted toward death. Under the Texas procedure, the death penalty is precluded unless the prosecutor can persuade all jurors beyond a reasonable doubt of an affirmative answer to the second question -- that is, that the death penalty is just under the circumstances. Under Ohio's procedure, by contrast, the death penalty is mandatory unless the defendant persuades the sentencer by a preponderance that a statutory mitigating factor exists.

hardly surprising that these factors have been regarded as justly calling for mitigation by the Florida legislature and the courts of Georgia and Texas. The same factors and others have been recognized as mitigating in the Model Penal Code §210.6(4), see Gregg, supra at 2935 n. 44, and in the legislation of other states, as this Court noted in Harry Roberts v. Louisiana, supra at 1996.12/

Measured by any relevant indicium of contemporary standards of decency, Ohio's law is woefully inadequate. As the decisions of the Court below testify, neither singly nor in combination will matters widely recognized as mitigating stay Ohio's death penalty on its appointed rounds. Although Ohio's law is not identical to the invalidated laws of North Carolina and Louisiana, Amicus submits that it is too close to survive constitutional scrutiny. The matter is, of course, one of degree. But it is also one of life or death, and it bears repeating that:

12/ Given this Court's recognition of the breadth of mitigation in other states, Amicus deems it unnecessary to include in this brief a comprehensive compilation of statutes. It is worth noting, however, that youth has been regarded as a factor precluding the death sentence even in statutes that have been declared unconstitutional for failing to embrace other mitigating factors. See Cal. Penal Code §190.3(a)(Supp. 1976), invalidated in Rockwell v. Superior Court, 18 Cal. 3rd 420, 556 P.2d 1101 (1976); N. Mex. Stat. Ann. §40A-29-2 (Supp. 1975), invalidated in State v. Rondeau, 89 N. Mex. 408, 553 P.2d 688 (1976); and N.Y. Penal Law §125.27 (1974), invalidated in People v. Velez, 88 Misc.2d 378, 388 N.Y. Supp.2d 519 (Sup. Ct. Trial Term, 1976).

> ...the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, supra at 2992. Ohio's intolerably narrow structure of mitigation, a structure attributable squarely to a misreading of Furman, subverts the value of reliability. It ignores a person's "iniquely individual" characteristics and treats him or her as one "of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." Id. at 2991. Amicus respectfully asks this Court to hold that Ohio's law is unconstitutional.

III. AS CONSTRUED AND APPLIED BY THE OHIO SUPREME COURT, OHIO REV. CODE §§2929.03(E) AND 2929.04(B) VIOLATE DUE PROCESS OF LAW AND IMPOSE CRUEL AND UNUSUAL PUNISHMENT BY PLACING ON THE DEFENDANT THE BURDEN OF PROVING A MITIGATING FACTOR BY A PREPONDURANCE OF THE EVIDENCE, THUS MANDATING THE DEATH PENALTY WHEN IT IS AS LIKELY AS NOT THAT A MITIGATING FACTOR EXISTS AND THE DEFENDANT DESERVES TO LIVE.

Ohio Rev. Code §2929.03(E) provides in relevant part that if the sentencing court "finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established

by a preponderance of the evidence, it shall impose sentence of death on the offender." Section 2929.04(B) provides that the death penalty is precluded when the sentencing judge finds that a mitigating circumstance "is established by a preponderance of the evidence." In State v. Downs, 51 Ohio St.2d 47, ____ N.E.2d ____ (1977), the Ohio Supreme Court upheld the constitutionality of these sections despite the fact that, "as to the burden of persuasion, it is apparent from the statute that if the evidence is in equilibrium, the risk of non-persuation falls upon the defendant." Id. at 55, ____ N.E.2d at ____.

In Ohio, a specified aggravating factor is an essential element of capital murder, §2929.03(B) and (C), and the prosecution is therefore constitutionally obliged to prove it beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). Yet, under Ohio's scheme, aggravation and mitigation are really reverse sides of the same coin: determining whether the offense is non-capital murder, in which event the death penalty is precluded, or whether it is capital, in which event the death penalty is mandatory. In effect, Ohio law recognizes the following separate offenses of murder: simple murder (§2903.02), punishable by fifteen years to life (§2929.02); aggravated murder (§2903.01), punishable by life imprisonment (§2929.02); doubly aggravated murder (§§2903.01 and 2929.04(A)) with a mitigating factor (§2929.04(B)), also punishable by life imprisonment (§2929.02); and capital murder, i.e., doubly aggravated murder without any mitigating factor, for which the death penalty is mandatory. Once this structure is recognized, it is clear that absence of mitigation is an element of capital murder, the risk of non-persuasion has to be allocated to the prosecution, Mullaney v.

Wilbur, 421 U.S. 684 (1975); In re Winship, supra, and Ohio's statutes are unconstitutional.[13/] But the result should be no different even if absence of mitigation is treated solely as an element of punishment rather than as an element of guilt.

In an amicus brief which we have sought leave to file in support of the Petition for a Writ of Certiorari in Woods and Reaves v. Ohio, No. 76-1308, we argued that the reach of Winship was extended in Mullaney when this Court applied Winship to a factor (provocation reducing murder to manslaughter) which, under Maine law, was not an element of guilt, but served solely to differentiate "punishment categories." Mullaney, supra at 689. Although we remain convinced of the validity of that argument, we recognize that it rests on an interpretation of Mullaney that is not congenial to a majority of this Court. See Patterson v. New York, 45 U.S.L. Week 4708 (U.S. June 17, 1977). We submit, however, that Patterson should not control in a matter of life and death. In Woodson v. North Carolina, supra at 2992, this Court recognized the qualitative difference between a death sentence and any sentence to confinement, however long, and accordingly insisted on stringent standards of reliability in the capital-sentencing process. Even in its own far less serious context, Mullaney regarded

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13/ Amicus concedes that the Ohio Supreme Court has refused to treat absence of mitigation as an element of capital murder. State v. Downs, 51 Ohio St.2d 47, ____ N.E.2d ____ (1977)(syllabus 6). But, if due process "...is concerned with substance rather than this kind of formalism," Mullaney v. Wilbur, 421 U.S. at 699, when life is not in the balance, a fortiori such formalism cannot be countenanced when it is.

it as "intolerable," 421 U.S. at 703, to subvert the value of reliability by imposing a sentence of long-term confinement on the defendant "...when the evidence indicates that it is as likely as not that he deserves a significantly lesser sentence." Ibid. Had Ohio allocated to the prosecution the burden of negating mitigating circumstances once the defendant introduced evidence adequate to raise the issue, it is at least strongly arguable that a death sentence would not have been imposed on the facts of the case at bar and in other cases, as well, especially Woods and Sandra Lockett, supra. But, as the Ohio Supreme Court has squarely held, an Ohio defendant can be killed when the evidence indicates that it is as likely as not that he deserves to live, albeit in a prison. State v. Downs, supra. For sheer intolerability, this beggars the concern for reliability voiced in Woodson and Mullaney. Amicus therefore respectfully urges this Court to hold Ohio's procedure unconstitutional and to establish firmly that a death sentence cannot be imposed until the prosecution persuades the sentencer beyond a reasonable doubt that the defendant deserves to die.

IV. OHIO REV. CODE §2929.03(C) VIOLATES THE RIGHT TO TRIAL BY JURY GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS AND IMPOSES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BY TOTALLY PRECLUDING THE JURY FROM EXPRESSING AN OPINION WHETHER, ON THE FACTS OF A PARTICULAR CASE, AS MEASURED BY CONTEMPORARY STANDARDS OF DECENCY, THE DEFENDANT DESERVES TO LIVE OR DIE.

Prior to Furman v. Georgia, 408 U.S. 238 (1972), the capital-sentencing decision in Ohio was entrusted solely to the jury unless the defendant waived trial by jury on the merits, in which event both trial and sentencing were handled by a three-judge court. Believing that compliance with Furman precluded jury sentencing, see Lehman and Norris, Some Legislative History and Comments on Ohio's New Criminal Code, 23 CLEVE. ST. L.REV. 8, 16-17, 20 (1974), a judgment that was proved wrong by Gregg v. Georgia, 96 S.Ct. 2909 (1976), the Ohio legislature enacted §2929.03(C) which remits the sentencing decision to one or three judges, depending on whether or not guilt was determined by a jury, and bars even advisory participation by the jury.

In the pre-Furman era, jury participation in the capital-sentencing process was so deeply rooted as to be axiomatic. See Woodson v. North Carolina, supra at 2985. Although this Court "has never suggested that jury sentencing is constitutionally required," Proffitt v. Florida, 96 S.Ct. 2960, 2966 (1976), and has opined that judicial sentencing should lead to greater consistency, ibid., it has neither considered nor approved any post-Furman death penalty statute that totally excluded the jury. Even the Florida statute sustained in Proffitt impinged but slightly upon the tradition that only a jury may impose a death sentence. Id. at 2965. By contrast, Ohio's statute bars even advisory participation by the jury, and therefore completely subverts the tradition.

From a Sixth Amendment perspective, the kinds of issues that may arise at an Ohio mitigation hearing are well within the traditional role of juries in criminal cases. Inducement by the victim is comparable to the substantive issue of consent; duress,

coercion and provocation have defensive or reductive counterparts; and mitigating mental condition is analogous to the defense of insanity. In terms of issues, therefore, there is no justification for barring jury participation in the determination of sentence.

Moreover, as appears from our argument relating to burden of proof, if Ohio's law is viewed with a concern for substance rather than formalism, issues of mitigation actually go to the degree of guilt, with mandatory or preclusive consequences on sentence. Consequently, such issues have to be jury triable under the Sixth Amendment. See United States v. Kramer, 289 F.2d 909, 921 (2d Cir. 1961).

From an Eighth Amendment perspective, at least advisory jury participation should be required even if mitigation relates exclusively to sentencing. It is clear that determining the validity of capital-sentencing procedures crucially implicates "contemporary standards of decency." Woodson v. North Carolina, supra at 2987. In the Sixth Amendment case of Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15 (1968), this Court, citing the Eighth Amendment decision in Trop v. Dulles, 356 U.S. 86, 101 (1958), observed that

> ...one of the most important functions any jury can perform...is to maintain a link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."

Although that observation was made in the context of a system of uncontrolled jury discretion, it is also vital where discretion is guided. See Gregg v. Georgia, supra at 2933. Indeed, as the Florida Supreme Court recently noted in McCaskill v. State, 21 Crim. L. Rptr. 2131 (Fla. April 7, 1977) (reversing a death sentence imposed by the judge after the jury had recommended life),

> We also cannot ignore the recommendation of the jury. This Court in reviewing the propriety of the death sentence must weigh heavily the advisory opinion of the sentencing jury....Juries are the conscience of our communities.

In important part, the conscience of the community is forged in the crucible of the jury room when adequately guided jurors of diverse background and experience debate the life-or-death decision. That debate simply cannot be replicated in the mind and heart of a single judge or even a panel of three. Ohio's law does not reflect a legislative judgment to the contrary. As noted above, the only judgment made by the Ohio legislature was that Furman precluded jury participation of any sort. That judgment has already been proved erroneous, and Amicus now respectfully urges this Court to declare it unconstitutional.

V. THE SCOPE OF REVIEW ACCORDED DEATH SENTENCES BY THE OHIO SUPREME COURT IS INADEQUATE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO INSURE THAT A DEATH SENTENCE IS WARRANTED BY THE FACTS OF A PARTICULAR CASE AND IS PROPORTIONATE TO SENTENCES IMPOSED IN SIMILAR CASES.

If society were convinced that trial judges and jurors made unassailably correct decisions of fact and law, there would be no need for any system of appellate review. Similarly, were we convinced of the invariable rectitude of intermediate appellate courts, a system of further review would be but a costly luxury. That appellate courts exist is therefore the strongest evidence of a deeply held belief that they significantly contribute to the reliability of the process, to the very reliability that is a fundamental concern in determining the constitutionality of a capital-sentencing scheme. See Woodson v. North Carolina, supra at 2992. Close scrutiny of death sentences by a state's highest court -- the only court with state-wide jurisdiction -- is a highly important procedural safeguard against the arbitrary and capricious imposition of the death penalty, Gregg v. Georgia, supra at 2937, for it helps to insure not only that the death penalty is appropriate when measured by the facts of a particular case, but also that it is proportionate to sentences imposed in similar cases. In the preceding sections of this brief, we have argued that Ohio's trial-level process for imposing the death penalty is unreliable from both substantive and procedural standpoints. In the present section, we submit that these profound deficiencies have been compounded by the narrow scope of review accorded death sentences by the Ohio Supreme Court.

Although death-sentence cases are reviewable as a matter of right in Ohio's appellate courts, including the Supreme Court, it was generally believed in the pre-Furman era that no Ohio reviewing court had the authority to set aside a death sentence as excessive or inappropriate. See McGautha v. California, 402 U.S. 183, 195 n.

7 (1971). However, in State v. Bayless, 48 Ohio St.2d at 86, 357 N.E.2d at 1045, the Ohio Supreme Court stated that it would "independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges." Amicus regrets to say that the Court has not kept its promise with fidelity to Eighth Amendment values.

The Ohio Supreme Court's notion of fairness apparently does not include an evaluation, such as occurs in Florida, see Proffitt, supra at 2969, of whether the death sentence in a particular case is compatible with sentences imposed in similar cases. In none of the twenty-five cases in which it has sustained the death sentence has it even attempted to compare the case with any other case in which the death sentence was imposed or with any case in which it was averted. Indeed, the Court seems to regard comparison as unnecessary, given the quasi-mandatory nature of Ohio's scheme. See State v. Alberta Osborne, 49 Ohio St.2d 135, 145-6, 359 N.E.2d 78, 86 (1977). The Court's attitude is all the more remarkable in light of the fact that some of its cases have concerned incidents involving joint participants of significantly different blameworthiness. See State v. Bell, supra; State v. Woods, supra; State v. Sandra Lockett, supra.

Nor does the Court's notion of fairness include a willingness to determine whether Ohio's trial judges used correct legal standards in making the life-or-death decision. As discussed earlier, the Ohio Supreme Court has purported to interpret various mitigating factors broadly for the benefit of defendants. These expansive readings, however, could hardly have been anticipated

by the judges who imposed the death sentence, and it is quite likely that they used narrower standards in holding that mitigation had not been proved. Despite this, the Ohio Supreme Court has not remanded a single case for a new sentencing hearing to be conducted pursuant to the newly articulated standards. Rather, with but one exception, the Court has simply reviewed the record as made, without even inquiring whether the standards used by the sentencer were compatible with the standards thereafter announced.[14/]

Additionally, the Ohio Supreme Court's notion of fairness does not include insistence in all cases on a complete record. In State v. Woods, 48 Ohio St.2d at 134 n. 2, 357 N.E.2d at 1064 n. 2, the Court complained that the record did not contain the presentence report that had been submitted to the trial court. Nevertheless, it proceeded to review the record without it, and affirmed the death sentence. The impropriety of this practice is manifest, Cf. Gardner v. Florida, 97 S.Ct. 1197 (1977), unless Ohio's law is so mandatory that presentence reports are irrelevant.

Finally, and most importantly, the Ohio Supreme Court's notion of fairness excludes close review of the facts. In Proffitt v. Florida, supra at 2966, this Court noted that, under Florida's procedure "the evidence

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14/ The single exception is State v. Carl Osborne, 50 Ohio St.2d 211, 221, ____ NE.2d ____, ____ (1977), in which the Court stated that the trial judge had used a correct definition of duress. When the Petition for a Writ of Certiorari is filed in Osborne, see note 9, supra, it should demonstrate that the Ohio Supreme Court misread the record.

of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida." The life-and-death importance of reweighing the evidence is dramatically illustrated by the fact, specifically noted by this Court, id. at 2967, that the Florida Supreme Court had set aside the death sentence in eight of the twenty-one cases it had then reviewed. The Ohio Supreme Court, by contrast, has reviewed twenty-six death sentence cases. It has set aside the conviction and sentence in one for evidentiary error unrelated to the penalty. State v. James Lockett, 48 Ohio St.2d 71, 358 N.E.2d 1077 (1976). In each of the twenty-five remaining cases, however, it has affirmed the death sentence. This result is shocking evidence of "cursory or rubber stamp review," Proffitt v. Florida, supra at 2969, but it is hardly surprising given the narrow standard of review adopted by the Court.

In State v. Edwards, 49 Ohio St.2d at 47, 358 N.E.2d at 1062, the Ohio Supreme Court, relying on a pre-Furman capital case, State v. Cliff, 19 Ohio St.2d 31, 249 N.E.2d 823 (1969), explicitly stated that

> in criminal appeals this court will not retry issues of fact [relating to mitigation]. In the circumstances at hand, we confine our consideration to a determination of whether there is sufficient substantial evidence to support the verdict rendered.

This extremely narrow standard of review, as Cliff makes clear, is intended to avoid only the most blatant errors, for it requires that the verdict or sentence be sustained unless no reasonable mind could reach the same conclusion. Whatever the merits of this standard in non-capital cases, surely

it does not suffice in capital cases to guarantee that the death penalty is appropriate when measured by the facts of a particular case, especially when the burden of proving mitigation is on the defendant.

The undiscriminating bite of the Cliff standard is obvious. As mentioned above, some of the Court's cases concern incidents involving several defendants. The case at bar is one; State v. Woods, supra, is another. In each, the participants were blameworthy, but in different degree. Yet each participant was sentenced to death, and the Ohio Supreme Court undiscriminatingly affirmed each sentence. But perhaps the most dramatic case is State v. Sandra Lockett, supra. As revealed by the unreported opinion of the Ohio Court of Appeals for the Ninth District, No. C.A. 7780 (March 3, 1976), at 9-10, the defendant was an accomplice -- the driver of the getaway car -- in what was intended to be merely the robbery of a pawn shop, but became a homicide. The prosecution's principal witness, Al Parker, was the one who pulled the trigger. He was permitted to plead guilty to non-capital murder in exchange for a life sentence. The accomplice, Sandra Lockett, although offered the same plea, refused, insisted on a trial, was convicted of capital murder and sentenced to death. The Ohio Supreme Court affirmed her sentence without even mentioning the life sentence received by Parker.15/

15/ The Court did, however, refer to that fact in the case of State v. James Lockett, 49 Ohio St.2d at 72, 358 N.E.2d at 1078. Sandra Lockett's refusal to plead guilty to non-capital murder was not an act of stubborn unrepentance. Indeed, the Ohio Supreme Court split 4-3 on whether she was guilty of any degree of murder.

As the Ohio Supreme Court's own decisions demonstrate, the standard of review it has adopted does not permit it to make the discriminating judgments of comparative blameworthiness that Woodson and the two Roberts cases require. The scope of review accorded capital cases is, therefore, inadequate to insure that a death sentence is warranted by the facts of a particular case and that it is compatible with sentences imposed in similar cases.16/

16/ The scope of review is also inadequate to insure that the defendant is guilty of capital murder, apart from mitigation. In State v. Carl Osborne, 50 Ohio St.2d 211, ____ N.E.2d ____ (1977), the capital-murder conviction rested solely on the aggravating specification of killing for hire. In the extensive record of that case there are but two statements regarding killing for hire, neither of which pertains to the defendant. The record is so inadequate that it offends the principle of Thompson v. Louisville, 362 U.S. 199 (1960). Nonetheless, the Ohio Supreme Court sloughed off the whole matter with a cryptic reference to "the totality of the evidence, including that bearing upon the doctrine of complicity...." 50 Ohio St.2d at 223, ____ N.E.2d at ____. See also State v. Miller, 49 Ohio St.2d 198, 361 N.E.2d 419 (1977) in which the conviction rested on fingerprints which, according to the dissenting opinion, could have been left at the scene by the defendant several weeks before the killing. Id. at 205-6, 361 N.E.2d at 424.

The representations above regarding the record in Osborne are based on the fact that Amicus played a similar role in Osborne, and counsel for Amicus read the Osborne record.

CONCLUSION

In its Gregg, Jurek and Proffitt decisions, this Court refused to declare the death penalty unconstitutional under all circumstances. But what it stressed in these cases, and in Woodson and the two Roberts cases as well, leaves no doubt that it will insist on the highest standards of reliability and procedural regularity before it upholds a death-sentence scheme. Superficially viewed, the arguments that we have tendered in this brief are different. Running through all of them, however, is a single question: has Ohio adhered to the highest standards, thus insuring that "death is the appropriate punishment in a specific case"? Woodson v. North Carolina, supra at 2992. Amicus submits that the answer is no.

When the Ohio legislature enacted Ohio's death-sentence scheme, it had but the uncertain guidance of Furman, and it was understandably concerned only to check the discretion that Ohio juries had theretofore exercised without control. The legislature was aware that an alternative to uncontrolled discretion was a mandatory death penalty imposed on all persons convicted of certain crimes regardless of mitigating circumstances. See Ohio Legislative Service Commission Staff Research Report No. 107, Capital Punishment, Legislative Implications of the U.S. Supreme Court Decision in Furman v. Georgia (1972), at 16. But it was advised that a mandatory death penalty, too, might be unconstitutional. Ibid. Consequently, the legislature tried to "split the difference" by specifying some mitigating factors, ignoring most, providing that the death penalty was precluded if any specified factor was proved by a preponderance of the evidence, and mandating the death penalty absent such proof.

In creating Ohio's narrow structure, the legislature failed to recognize that some of the mitigating factors it had specified were inconsistent with aggravating circumstances essential for guilt of capital murder; it failed to distinguish the specified mitigating factors from their defensive or reductive counterparts; and it gave no weight to mitigating matters which this Court, other courts, and other legislatures now require in determining whether, under contemporary standards of decency, death is the appropriate punishment in a given case. Having subverted reliability, the legislature compounded the error by forcing the defendant to prove mitigation, thus increasing the risk of an erroneous decision, of a decision that the death penalty is appropriate when, just as likely, it is not. Then the legislature remitted the entire sentencing decision to the court, totally precluding any input from jurors whose diverse backgrounds and experience are a source of contemporary standards of decency. Finally, the legislature failed to require appellate review adequate to insure that a death sentence is appropriate in a specific case and that it is compatible with sentences imposed in similar cases.

Measured by its primary concern -- controlling discretion -- the legislature was moderately successful. But in terms of what were to become the concerns of this Court, it failed miserably, thus casting the onus on the Ohio Supreme Court.

The Ohio Supreme Court held all cases, awaiting this Court's second-round decisions. But, as applied to Ohio's law, Woodson and Stanislaus Roberts, on the one hand, and Gregg, Proffitt and Jurek, on the other, raised an issue of the profoundest difficulty: how to salvage the legislature's errors without engaging in too much "judicial

legislation."[17] Aware of the differences between Ohio's narrow law and the much broader formulations of Georgia, Florida and Texas, State v. Bayless, 48 Ohio St.2d at 86-7 & n. 2, 357 N.E.2d at 1045-6 & n. 2, the Court initially chose to dismiss them as inconsequential. Ibid. Overlooking the fact that the legislature had misread Furman, the Court simply contented itself with the observation that the legislature's task had been "delicate." Id. at 86, 357 N.E.2d at 1046. But the issue would not subside, and in subsequent cases the Court was forced to confront it in all of its difficult ramifications. The separate steps in this effort have already been recounted in part II A of this brief, and need not be detailed here. Yet, three points must be made. First, the Court never even attempted to reconcile Ohio's mitigating factors with the aggravating circumstances essential to guilt of capital murder. Second, the Court's attempt to differentiate the mitigating factors from their defensive or reductive counterparts so deeply implicated a range of integrated issues of substantive criminal law that the case-by-case process became uniquely unwieldy. Third, and most important, the Court's try at giving a modicum of mitigating effect to youth and absence of a prior record -- matters that the legislature had not specified -- foundered on the fact that the already specified mitigating matters precluded imposition of the death penalty.

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[17] The Court could hardly have been unaware of the issue. Indeed, the issue was squarely called to the Court's attention in a brief filed by Amicus in State v. Carl Osborne, supra, three weeks before the Court rendered its first death-penalty decision in State v. Bayless, supra.

Apparently unwilling to ignore unspecified matters totally, yet equally unwilling to rewrite the statute to give them preclusive effect, the Court awkwardly tried to shoehorn youth and absence of a prior record into mitigating duress and mental deficiency.

That the effort failed is obvious; Ohio's law is hardly broader in its application than it is on its face. What is less obvious is that the effort was doomed to failure by the intractability of the issues with which the Ohio Supreme Court was confronted. That unhappy burden was thrust on the Court solely by virtue of the legislature's understandable misreading of Furman. That the Court was unable to carry it, that the Court failed to create a reliable death-penalty scheme, as required by Woodson and the two Roberts cases, is also understandable.

Amicus therefore respectfully urges this Court to give the State of Ohio the opportunity to comply with high standards of reliability and procedural regularity, as befits a process with life in the balance, by declaring Ohio's death-penalty scheme unconstitutional.

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